Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975.
No. 75-460

LARRY E. COTTEN, *et al.*,
Petitioners,

vs.

TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

MACK D. COOK, II
1600 First National Tower
Akron, Ohio 44308
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

October Term, 1975

No. _____

LARRY E. COTTEN, ROBERT F. BOOTH, BARBARA D. BOOTH, RITA JOYCE SMREKAR, PAUL and MARJORIE LABIK, HERMAN and OPAL I. BAKER,

Petitioners,

vs.

TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners Larry E. Cotten, *et al.*, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 1, 1975, and the Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc on August 12, 1975.

OPINIONS BELOW

The Opinion of July 1, 1975, rendered by the Court of Appeals for the Sixth Circuit dismissing Petitioners' appeal for lack of jurisdiction, and the Order of August 12, 1975, determining that the Petition for Rehearing was not well taken, are both as yet unreported. The Memorandum Opinion and Order of the District Court entered on November 14, 1974, denying Petitioners' application for certification as a class action is also unreported. All are reprinted in the Appendix hereto.

JURISDICTION

This Petition was filed within ninety (90) days of the Order denying Petitioners' timely filed Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. When the District Court has found in a denial of class certification that a prerequisite of Rule 23(b)(3), Federal Rules of Civil Procedure, has not been satisfied, does the Sixth Circuit Court of Appeals lack 28 U.S.C. §1291 jurisdiction to review such a finding, even if such finding is clearly erroneous, unless the record on appeal will show that individual members cannot proceed with the action as such and that denial of class certification will extinguish the action?

II. When equitable relief is sought on behalf of a class, including contract rescission and cancellation of confessed judgments taken wrongfully as a matter of routine

business practice but following an old Pennsylvania confession-of-judgment procedure, is the order denying class certification appealable pursuant to 28 U.S.C. §1292(a)(1)?

III. When class certification is denied for lack of one or both of the subjective prerequisites of Rule 23(b)(3), Federal Rules of Civil Procedure—*predominance, superiority*—is the order of the District Court final and appealable pursuant to 28 U.S.C. §1291?

IV. When the District Court has not made a prompt determination and eventually denies class action certification, placing the burden of large litigation expense on the Petitioners as individual class members and also raising serious Statutes of Limitation questions as to proposed class members who do not intervene, is the order of the District Court denying class certification appealable pursuant to 28 U.S.C. §1291?

V. The Ohio Rule as to interlocutory appeals from orders dismissing class action allegations; is it persuasive here?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment, provides:

> No person shall . . . be deprived of . . . property, without due process of law; . . . .

The United States Constitution, Fourteenth Amendment, provides:

> . . . nor shall any State deprive any person of . . . property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil . . . case.

28 U.S.C. §1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. §1292(a)(1) provides:

> The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district court . . . , refusing . . . injunctions, except where a direct review may be had in the Supreme Court.

15 U.S.C. §1640(e) [Consumer Credit Protection Act] provides:

> Any action under this section may be brought in any United States district court, . . . , within one year from the date of the occurrence of the violation.

15 U.S.C. §1711 [Interstate Land Sales Act] provides:

> No action shall be maintained to enforce any liability created under section 1709(a) or (b) (2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 1709(b)(1) of this title, unless brought within two years after the violation upon which it is based. In no event

> shall any such action be brought by a purchaser more than three years after the sale or lease to such purchaser.

15 U.S.C. §1719 [Interstate Land Sales Act] provides:

> The district courts of the United States . . . shall have jurisdiction of offenses and violations under this chapter and under the rules and regulations prescribed by the Secretary pursuant thereto, . . . , of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought to enforce any liability or duty created by this chapter. . . . Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of Title 28.

28 U.S.C. §1343(3) and (4) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, ...

Rule 1, Federal Rules of Civil Procedure provides:

> These rules . . . shall be construed to secure the just, speedy and inexpensive determination of every action.

Rule 23, Federal Rules of Civil Procedure.

(See Appendix, p. 39)

Rule 406, Federal Rules of Evidence provides:

HABIT; ROUTINE PRACTICE

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Ohio Revised Code, §2505.02.

(See Appendix, p. 40)

STATEMENT OF THE CASE

The Petitioners as individual members of a class and each a member of the class they seek to represent, at some time prior to filing of the Complaint on February 9, 1973, had *in writing* agreed with Treasure Lake and contracted with Westinghouse Credit to purchase a product and pay "several thousands of dollars" plus interest on terms in monthly installments.[1]

The product offered for sale on terms was not a Westinghouse electrical appliance, refrigerator or TV. The product was land, an unimproved lot in the Treasure Lake Development in Pennsylvania, alleged to have "a reasonable value not in excess of Two Hundred Dollars ($200) per acre."

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1. The installments were usually monthly for 10 years.

The first named plaintiffs, Larry E. Cotten, the Booths, and Rita Joyce Smrekar, collectively sought advice of counsel a few months after their lot purchase. Their counsel (Ronald N. Towne, Esq.) then wrote [November 16, 1972] to a Pittsburgh attorney known to represent the Respondents, referring to "an action for rescission and compensation for damages stemming from the land sale deal with Treasure Lake, Inc."

The Pittsburgh attorney replied [November 27, 1972]

> ". . . the company in the past has been very lenient in granting refunds but as so often happens, once this is done for one person who is represented by a lawyer, then others seem to gravitate to that lawyer to obtain the same result, whether or not their claims are justified, and it becomes an easy pattern to make the same charges for all customers."

The "various sales papers" signed by each lot purchaser were standardized, comprising (1) an installment NOTE (2) ARTICLES OF AGREEMENT, (3) VERIFICATION, (4) PURCHASER'S STATEMENT OF PRINCIPLE [sic] RESIDENCE, and (5) a short term NOTE for the downpayment.

These documents were carefully reviewed and tested against the proscriptions of the Consumer Credit Protection Act, popularly known as "Truth in Lending", 15 U.S.C. §§1601, *et seq.* It was the opinion of counsel, as alleged, "While extending or arranging for extensions of credit to the Plaintiffs for installment purchases of land at Treasure Lake Allotment, the Defendants violated the Consumer Credit Protection Act, 15 U.S.C. §§1601 et seq. and Regulation Z, 12 C.F.R. §§226.1 et seq." The violations alleged were *acts of omission*, "was nots" and "did nots",

principally in the context of the standardized ARTICLES OF AGREEMENT.

The Petitioners were also questioned as to the inducements, representations, the "sales pitch" of the Treasure Lake sales persons. The Treasure Lake Property Report given each lot purchaser was reviewed for accuracy. Each Petitioner was questioned as to their understanding of a waiver of right to rescind clause in the ARTICLES OF AGREEMENT. It was the opinion of counsel that there were *per se* violations of the Interstate Land Sales Act, 15 U.S.C. §§1701, *et seq.* The known facts, provable by evidence of the routine practice of the Respondents, were alleged within the context of both the proscriptions and the prescriptions of the Interstate Land Sales Act.

Two bases for federal jurisdiction in the District Court were 15 U.S.C. §1640(e) and 15 U.S.C. §1719. The invocation by Petitioners of the Civil Rights Act jurisdiction pursuant to 28 U.S.C. §1343(3) and (4) was intended to provide subject matter jurisdiction for equitable relief to remedy two other wrongs committed as a routine practice against the lot purchasers at Treasure Lake Development.

Immediately following the close of each purchase transaction, the attention of Respondent Westinghouse Credit focused on the installment NOTE. Counsel determined that the NOTES, as alleged, ". . . were not sufficient at law to create an immediate cognovit right for the benefit of the Defendants, or anyone."

Counsel had also determined subsequent to November 27, 1972, that Respondent Westinghouse Credit was *pro forma* defaulting notes signed by lot purchasers at Treasure Lake Development. As alleged, "Without Plaintiffs' knowledge, consent or default and without demand for payment of the sums set forth thereon, agents of Westing-

house Credit Corporation caused judgment to be confessed against Plaintiffs, in a court of the State of Pennsylvania, Clearfield County, on the notes [PX 21]."

The Civil Rights Act jurisdiction and the proof of the note allegations would raise as an ultimate question of law whether the lot purchasers had "any right, privilege, or immunity secured by the Constitution of the United States and by an Act of Congress . . ." not to become an unwilling judgment debtor of Westinghouse Credit as a matter of routine practice.

If all lot purchasers have a "right" not to be wrongfully adjudged in default on an installment NOTE by a Respondent solicited act of a Pennsylvania Prothonotary, an order of mandatory injunction by the District Court could direct the Respondents to "forthwith and promptly cancel and void said judgments as wrongfully taken."

The fourth general category of wrong committed against lot purchasers by Respondents, as a routine practice designed and intended to preserve and protect the fruit of a "sales pitch", involved the right of rescission. Both Public Policy Acts, Consumer Credit and Interstate Land Sales, provide for rights of rescission. Proof of a common set of related facts could have led to a conclusion of law that Respondents had intended to deny lot purchasers any right of rescission. If the right of rescission as defined "under any Act of Congress" is a *civil right*, equitable relief under 15 U.S.C. §1343(4) could have been an order of mandatory injunction directing Respondents to restore the right of rescission to lot purchasers, subject to a condition such as return of the land to Westinghouse Credit.

ARGUMENT

The issues inherent in the two opinions below involve and embrace important questions of federal law which have not been, but should be, settled by this Court. The failure by the Appellate Court to review the action by the District Court is such as to call for an exercise of this Court's power of supervision of federal judicial proceedings.

QUESTION I

The Petitioners' case [*Cotten*] was argued to the Sixth Circuit [April 24, 1975] as one of a trilogy, with §1291 appealability being a common issue. A related case involving a denial of class action certification, *Ott v. Speedwriting Publishing Co., Inc.*, No. 74-2002, was decided July 14, 1975 (see App. 30).

In *Cotten*, it is said:

> "Because of the amount of claim of each of the named plaintiffs this case does not require consideration of the 'death knell' rule enunciated in *Eisen v. Carlisle & Jacquelin*, [Eisen I], 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); see *Ott v. Speedwriting Pub. Co., Inc.*, ... F.2d ..... (6th Cir. No. 74-2002, 1975)."

Eisen IV, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), was factually distinguished and the "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) was not applied.

The "death knell" rule first enunciated for the Sixth Circuit Court of Appeals in *Ott* (App. p. 38), and referenced in *Cotten*, is embodied in Question I.

A subsidiary question inherent in Question I is whether the "death knell" rule as now adopted in *Ott* and *Cotten*, distinguishing between small claims and larger claims, denies the larger claimant *equal protection* Fourteenth Amendment rights, assuming that these rights by virtue of Fifth Amendment *due process* are applicable as to the United States Court of Appeals. See, *Johnson v. Robison*, 415 U.S. 361, n. 4 (1974).

A resolution of Question I would greatly benefit not only the Sixth Circuit Court of Appeals, but all courts of appeals by redirecting attention to the three-fold test of *Cohen, supra*, firmly based on the fundamental principle, consistent with due process, "that the requirement of finality is to be given a 'practical rather than a technical construction.'" *Eisen IV, supra*, at 171.

QUESTION II

Had the class action been certified by the District Court, upon proof of the allegations as to the wrongfully confessed Pennsylvania judgments, an order commanding cancellation as to all affected lot purchasers could have been issued. The Pennsylvania confession-of-judgment procedure was last before this Court in *Swarb v. Lennox*, 405 U.S. 191 (1971), a class action involving Pennsylvania residents who signed documents leading, or that could lead, to confessed judgments in Philadelphia. The District Court had enjoined use of the Pennsylvania system for classes of persons making less than ten thousand dollars ($10,000). No appeal was taken on the class definition by monetary amount.

In the same term, *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), dealt with a class action against Connecticut sheriffs who levy on bank accounts, and against

creditors who invoke the garnishment statute. Recognition by this Court of 28 U.S.C. §1343(3) jurisdiction in situations involving state action and creditors' rights was the precedent basis for Petitioners' jurisdictional allegation under the Civil Rights Act. If the District Court in *Cotten* were to have granted a mandatory injunction directing that Respondent Westinghouse Credit cancel the judgments, such an *in personam* order would have caused no conflict whatsoever with 28 U.S.C. §1283; a concern expressed by three members of this Court in *Lynch*.[2]

The record before the District Court suggests that 2,528 lot purchasers at Treasure Lake Development, during the time period January 1, 1970, until filing of the Complaint, were residents of Ohio and other states, excluding Pennsylvania. Therefore, applying the law of *Grover & Baker Machine Co. v. Radcliffe*, 137 U.S. 287 (1890), that as to the subclass of lot purchasers non-resident in Pennsylvania, the judgments by the Prothonotary under the 1806 law are void, the District Court could have granted injunctive relief as to these 2,528 lot purchasers.

Before the Sixth Circuit, counsel for Petitioners could cite no decision by this Court as precedent permitting appeal when a class of lot purchasers had been denied injunctive relief founded upon a 28 U.S.C. §1343(3) and (4) claim. Though factually quite different, *Brunson v. Board of Trustees of School District No. 1*, 311 F.2d 107, 108 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), *Yaffee v. Powers*, 454 F.2d 1362, 1364-1365 (1st Cir. 1972) and *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th

2. Upon remand, *Lynch v. Household Finance Corp.*, 360 F.Supp. 720 (D. Conn. 1973), the garnishment statute was held unconstitutional and the defendants enjoined from taking any continuation or further action based upon the provisions of the statute.

Cir. 1974), were cited as being persuasive authority for §1292(a)(1) appealability.

The Sixth Circuit in *Cotten* did not mention the question of §1292(a)(1) appealability. Raised again by the Petition for Rehearing [7/15/75], the Sixth Circuit still remained silent. Although the Sixth Circuit has neither agreed nor disagreed with statements by sister courts, such as:

> . . . [T]he order is an appealable one under 28 U.S.C. §1292(a)(1) because its effect is a 'denial of the broad injunctive relief' which the plaintiffs sought on behalf of the class. *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974);

a resolution of Question II by this Court would determine an important question of federal law.

QUESTION III

The District Court's Order of November 14, 1974 [App. p. 28], does not deny the existence of any of the Rule 23(a) prerequisites to a class action. The District Court did not make a finding as to the numerosity, commonality, typicality or adequacy of representation factors of Rule 23(a). The District Court dealt only with the findings required by Rule 23(b)(3), *predominance* and *superiority*.

Rule 23(b)(3) says that as to *predominance* and *superiority*, the District Court should consider four factors: "(A)" individual interest; "(B)" other pending litigation; "(C)" forum concentration; and "(D)" manageability.

Those factors pronounced and found by the District Court[3] were uniquely designed to fit merit issues of *Cotten*. They were:

3. As editorially designated in the Appendix, pp. 28 and 29.

(i) In each and every case, misrepresentations by Treasure Lake salesmen must be specifically proven both as to the Consumer Credit Protection Act and the Interstate Land Sales Act;

(ii) Plaintiffs' reliance on the misrepresentations by Treasure Lake salesmen must be proven individually;

(iii) The counterclaims created by the confessed Pennsylvania judgments raise individual issues against Plaintiffs;

(iv) The prospect of attorneys' fees under the Truth in Lending Act and the damage claims under the Interstate Land Sales Act are certainly enough to provide significant motivation for individual actions by all potential class members;

(v) The various class members are seeking conflicting remedies; and,

(vi) The "similar reasons" as set forth in *Siebert v. Great Northern Development Company,* Civil Action No. 17349 (N.D. Ga. 1974), are also controlling.

The Sixth Circuit Court of Appeals had before it, in the briefs and record below, arguments why each factor had been erroneously determined by the District Court. Summarized, the arguments went basically as follows:

(i) The "fraud or deceit" wrongs alleged are not exclusively oral misrepresentations. The alleged Truth in Lending violations and the Interstate Land Sales violations arising from the Property Reports were *acts of omission or misstatement.* By analogy, Securities and Exchange Commission Rule 10b-5 cases such as *Harris v. Palm Springs Alpine Estates, Inc.,* 329 F.2d 909, 914 (9th Cir. 1964) are persuasive. A

recent case in point is *Hoffman v. Charnita, Inc.,* 58 F.R.D. 86, 90-91 (M.D. Pa. 1973). As declared in the record below, *Cotten, et al.* intended to show commonality of the alleged oral misrepresentations—the sales presentation and techniques—by offering proof of the "routine business practice" of the Defendants in the manner as set forth in Rule 406, Federal Rules of Evidence.

(ii) *Cotten, et al.* is not an action involving common law fraud. It is conceded that actions founded on common law fraud require proof of individual reliance. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. See, *Agnew v. United States,* 165 U.S. 36, 53 (1897). The federal courts have taken various paths in recent years, summarized in *Korn v. Franchard Corp.,* 456 F.2d 1206, 1212-1214 (2d Cir. 1972), to reduce the difficulties of showing individual reliance in Rule 10b-5 cases, and by analogy in Interstate Land Sales cases. In *Kahan v. Rosenstiel,* 424 F.2d 161, 173-174 (3rd Cir. 1970), *cert. denied,* 398 U.S. 950 (1970), the Court adopted the test of inferring from the materiality of the misstatement that a reasonable investor would have relied. Relevant decisions by the Supreme Court include *Mills v. Electric Auto-Lite,* 396 U.S. 375 (1970), and *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153-154 (1972), dispensing with the need to prove individual reliance in Rule 10b-5 cases involving nondisclosure.[4]

(iii) The wrongfully confessed Pennsylvania judgments, giving rise to, or evidence of, the counterclaims of Westinghouse Credit are themselves sub-

4. Petitioners claim representation of a demonstrable number of lot purchasers and plead for statutory damages neither conjectural nor speculative. *Cf. Blue Chip Stamps v. Manor Drug Stores,* ___ U.S. ___, 95 S.Ct. 1917, 1925 (1975).

ject to cancellation under the Civil Rights Act allegations of *Cotten*. Westinghouse Credit is not asserting counterclaims of various origin which would be subject to numerous personal defenses, but is asserting counterclaims of a single origin--the installment NOTE executed by each lot purchaser—and of liquidated amounts, and which are subject to a common defense by all class members. A case quite in point is *Weit v. Continental Illinois National Bank and Trust Company of Chicago*, 60 F.R.D. 5, 8 (N.D. Ill. 1973).

(iv) This finding was made intentionally by the District Court to preclude invocation of the "death knell" doctrine which would have permitted §1291 review. But this finding could only have been made after consideration of the merits of Petitioners' Interstate Land Sales claim. The Supreme Court has found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen IV, supra*, at 177. An intrusion into the merits is improper. See, *Miller v. Mackey International, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971).

(v) The various class members are not seeking conflicting remedies. Alternate remedies are manageable without denial of class certification. Until each of the wrongs have been adjudged, there can be no possibility of a conflict. Looking ahead, for the 459 lots sold at Treasure Lake Development in the one year period prior to February 9, 1973, and considering that the Truth in Lending Act has recently been amended to provide that the maximum recovery in the case of a class action is ". . . the lesser of $100,000 or 1 percentum of the net worth of the creditor." [15 U.S.C. §1640(a)(2)(B)], one subclass

would receive $217.86 each. The Interstate Land Sales class, comprising approximately 1,420 lot purchasers, including the Truth in Lending subclass, could be awarded "several thousands of dollars" as §1709 (c) damages. Inherent in such an award would be return of the land to Westinghouse Credit. As to those class members beyond a two-year limitation period, those who were sold lots prior to February 9, 1971, should the District Court determine that the right of rescission provided by §1703(b) is a *civil right* created by an Act of Congress, 28 U.S.C. §1343 (4) sanctions an award equal to what has been paid to Respondent Westinghouse Credit Corporation, plus interest. Again, inherent in an award to this subclass would be return of the land to Westinghouse Credit. *All of the estimated 3,777 purchasers with the wrongfully confessed judgments would benefit from cancellation thereof.*

The *damage award* would vary from subclass to subclass. The substantive nature of the Public Policy Acts involved so requires. However, that the damage award for some will be less than for others should not create "potential issues of conflict between various class members." Judicial resolution of a "potential for a conflict of interest between certain class members" may be found in *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 80 (M.D. Pa. 1973).

(vi) The facts in *Siebert v. Great Northern Development Co.*, unreported, *aff'd.* 494 F.2d 510 (5th Cir. 1974) are distinguishable from the facts of record in *Cotten*.

Question III presented for review embodies the questions and arguments before the Sixth Circuit for review

on the merits. The Sixth Circuit said in *Cotten*, "We do not reach the merits of the case as we are of the opinion that the decision of the District Court was not final and no final appealable order has yet been entered." (App. p. 25).

The Petitioners' argument for appellate jurisdiction was based on *Cohen, supra*—

> *First*, the issue of class certification is separable from, and collateral to, rights asserted by individual members. The Order of the District Court ". . . did not make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen, supra* at 546. The right of lot purchasers to be represented by Petitioners is a right separable from, and collateral to, rights asserted by the Petitioners on behalf of a class.

Second, the collateral rights disposed of are too important to be denied immediate review. During the pendency of this action [31 months as of September, 1975], the applicable Statutes of Limitation for the Public Policy Acts have run, precluding commencement of individual actions. The right of "timely filed" intervention, protected by *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not assuage the loss of that right to those lot purchasers who have no actual notice of *Cotten* or those who had knowledge of the commencement of *Cotten* [which received newspaper publicity] and relied thereon in failing to press their individual claims. Without *due process notice*, a right to intervene is meaningless.

Third, the Order of the District Court is self-executing and insulated from review. The Order could be applied as the "law of the case" and used to exclude

evidence relating to *other lot purchasers*. If Rule 406, Federal Rules of Evidence is not usable, the testimony of many lot purchasers would be needed to establish proof of *predominance*. The Order is similarly self-executing in the finding of lack of *superiority*. Unless many individual actions are commenced [to be barred by the Statutes of Limitation in Truth in Lending and Interstate Land Sales?], there will be no collateral proof of *superiority*. If appellate review must await the final order in *Cotten* ". . . [w]hen that time comes, it will be too late effectively to review the . . . order, and the rights conferred . . . will have been lost, probably irreparably." *Cohen, supra*, at 546.

Ruling on or resolution by this Court as to the questions of law embodied in Question III would determine important questions of federal law.

QUESTION IV

Rule 1, Federal Rules of Civil Procedure, speaks to "the just, speedy and inexpensive determination of every action."

Cotten began February 9, 1973. Class certification was first requested April 2, 1973.[5] Class certification was denied November 14, 1974. The total of ninety-three (93) entries on the Civil Docket sheet of *Cotten* during this time period speaks for lack of expeditious determination of the class aspect. Rule 23(c)(1). *Cotten, et al.* remain ultimately responsible to their counsel for "the expenses of litigation."[6] *Cotten, et al.* can not even back

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5. Docket entry number 8.
6. See, DR5-103, Code of Professional Responsibility.

out of the litigation at this time without being further saddled by default judgments in the District Court rendered on the counterclaims, counterclaims based solely on improper judgments recorded in a Pennsylvania court. The rights of *Cotten, et al., a named class* acting as representatives of a *described class,* have been abridged and eroded by the passage of time and the attrition of litigation expenses. The now protracted nature of *Cotten* and "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all", *Eisen IV, supra,* at 161.

Buried almost out of sight but not totally lost from view is a fundamental of justice that Rule 23 class actions can be, and will be if it be so decided by this Court, used with compelling effect to enforce the Public Policy Act rights and civil rights of citizens of these United States. There exists a compelling need for immediate protection by this Court of citizens' rights, periled by passage of time, litigation expense, default judgments, and express Statutes of Limitation. Exercise of this Court's power of supervision of the judicial proceedings below can well meet such need; indeed, it is the only justice that now can be had.

QUESTION V

In Ohio, Appellate Court review of the trial court's denial of class certification would have taken place. Ruling on a "Final Order" statute [App. p. 40] and an Ohio Rule 23 counterpart of Federal Rule 23, the Supreme Court of Ohio said in *Roemisch v. Mutual of Omaha Ins. Co.*, 39 Ohio St. 2d 119, 123-124 (1974):

> In our opinion, the underlying purpose of R.C. 2505.02 is to limit the absolute number of appeals taken. If a trial court determines that a class of plaintiffs is not permitted to function as such in a lawsuit, the number of actions filed will approach the magnitude of the number of class members, and possible appeals from those actions would far exceed any number of 'piecemeal' appeals arising from a unified class action. Judicial economy would be sacrificed at both the trial and appellate level.
>
> The termination of a class action is of critical importance in that the rights of a class, *sui juris*, are either denied or affirmed at that stage. The finality requirement would be insurmountable if the class was not permitted an immediate appeal from an order which carries with it such compelling significance. To hold otherwise would effectively place the existence of class actions in the unreviewable discretion of trial courts.

* * *

In *Cotten*, the Sixth Circuit did not even mention *Roemisch.*[7]

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MACK D. COOK, II
1600 First National Tower
Akron, Ohio 44308
Attorney for Petitioners

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7. *Cf.* ". . . class-action litigation could be chilled by non-appealability of denials of certifications save in narrowly limited circumstances, . . ." *Williams v. Mumford,* 511 F.2d 363, 371, (D.C. Cir. 1975, Robinson, J. dissenting).

APPENDIX

OPINION OF THE COURT OF APPEALS

(Decided and Filed July 1, 1975)

No. 75-1035

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LARRY E. COTTEN *et al.*, *Plaintiffs-Appellants, v.* TREASURE LAKE, INC., *et al.*, *Defendants-Appellees*

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

WEICK, Circuit Judge. This is an appeal from an order of the District Court denying plaintiff-appellants' application for certification of their action as a class action. The appellees filed a motion to dismiss the appeal on the ground that the order of the District Court denying certification as a class action was not a final decision or an appealable order under 28 U.S.C. § 1291.

The motion to dismiss was considered by the Court and was denied without prejudice to renewal when the appeal was to be heard on its merits.

We later heard arguments on the merits of the case and also arguments on the motion to dismiss, which motion had been renewed.

The suit in the District Court was filed by several persons in their own behalf as purchasers of lots in the Treasure Lake Development in Pennsylvania, and on behalf

of numerous other purchasers of lots in the development, as a class, to recover damages for fraud in connection with the various sales of the lots. Violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.*, and the Civil Rights Act, 28 U.S.C. §§ 1343(3) and (4) were alleged. Rescission of the purchase contracts was also sought.

In its memorandum opinion and order the District Court was of the view that individual issues would constitute the bulk of the evidence at the trial since plaintiffs were largely asserting fraudulent oral misrepresentations made to various purchasers of the lots, on which misrepresentations they relied in signing the various sales papers; that such misrepresentations would necessarily have to be proven individually in order to establish violation of the Interstate Land Sales Full Disclosure Act and the Truth in Lending Act; and also that the counterclaims asserted by the defendants would raise individual issues. The Court was of the opinion that the action failed to satisfy the requirement of predominant questions of law or fact required by Rule 23, Fed.R.Civ.P., and could not be properly maintained as a class action.

The Court was also of the view that the provisions of the Truth in Lending Act for the award of attorney's fees to successful plaintiffs and the amounts of the typical claims of potential class members, which were in the range of several thousands of dollars, were enough to provide significant motivation for individual actions.

The Court relied on an unreported opinion of the District Court for the Northern District of Georgia, in *Siebert v. Great Northern Dev. Co.*, Civil Action No. 17,349 (N.D.Ga., 1973), which involved a similar action, with some of the same defendants in the present case.

We do not reach the merits of the case as we are of the opinion that the decision of the District Court was not final and no final appealable order has yet been entered. The case is still pending in the District Court. Therefore, we have no jurisdiction to consider the merits of the appeal.

Cobbledick v. United States, 309 U.S. 323 (1940) makes it clear that only final judgments or decrees are appealable.

Rule 23(c)(1) of Fed.R.Civ.P. provides in part:

> An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

This provision of the Rule definitely establishes that an order certifying or denying certification of a class action is not final because the Court may change the order at any time before it decides the case.

We considered this rule in *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969). In that case the District Judge initially determined that the action could not be maintained as a class action. Upon reconsideration, the District Judge changed his mind and held that the action could be maintained as a class action. The defendants appealed and we dismissed the appeal for lack of jurisdiction. In *Walsh* we declined to apply the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) to orders maintaining or refusing to maintain a class action. We are not persuaded that we should establish a different rule in the present case.

Because of the amount of the claim of each of the named plaintiffs this case does not require consideration of the "death knell" rule enunciated in *Eisen v. Carlisle*

& Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); see *Ott v. Speedwriting Pub. Co., Inc.*, ... F.2d ..... (6th Cir., No. 74-2002, 1975).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) may be distinguished on the ground that the order from which the appeal was taken finally allocated notice costs against petitioner.

The Fifth Circuit was in accord with our views when it dismissed for lack of jurisdiction an appeal taken from the unreported decision of the District Court for the Northern District of Georgia, hereinbefore referred to, and on which the District Judge relied. *Siebert v. Great Northern Dev. Co.*, 494 F.2d 510 (5th Cir. 1974).

The order of the District Court declining to certify the class may be fully reviewed in any appeal taken from a final judgment later entered in this case.

The motion to dismiss the appeal is therefore granted and the appeal is dismissed for lack of jurisdiction.

ORDER DENYING REHEARING

(Filed August 12, 1975)

No. 75-1035

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LARRY E. COTTEN *et al.*, *Plaintiffs-Appellants, v.*
TREASURE LAKE, INC., *et al.*,
Defendants-Appellees

Before WEICK, LIVELY and ENGEL, Circuit Judges.

No active judge having requested that a vote be taken on the suggestion that the petition for rehearing be heard en banc, the petition for rehearing was then considered by the panel and determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied.

OPINION OF THE DISTRICT COURT

(Filed November 14, 1974)

No. C73-144

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

LARRY E. COTTEN *et al.*, *Plaintiffs, v.*
TREASURE LAKE, INC. *et al.*, *Defendants*

BATTISTI, *C.J.*

Plaintiffs have applied for certification that this action be maintained as a class action, as provided by F.R.C.P. 23. For the reasons outlined below, this application is denied.

Since this would be a Rule 23(b)(3) class action, it could be certified only if it were determined that common questions of law or fact must predominate over the individual issues presented by the dispute, and also that a class action would be superior to other methods available for the fair and efficient adjudication of the controversy. Neither finding can be made in this case.

It seems clear that, in this case, individual issues would constitute the bulk of the evidence required at trial, since the plaintiffs' allegations are largely assertions of fraudulent oral misrepresentations made to various Treasure Lake purchasers. In each and every case, such misrepresentations must be specifically proven. [*Factor* (i)*]

Further, plaintiffs' reliance on such alleged misrepresentations must also be proven individually in order to establish violations of the Interstate Land Sales Act and Truth in Lending Act. [*Factor* (ii)]

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*[Editorially designated]

Finally, the counter-claims pressed by defendants against many of the potential class members also tend to raise individual issues over the common questions which would be raised at trial. [*Factor* (iii)]

Thus, this action fails to satisfy the requirement of predominant questions of law or fact.

In addition, many factors in this action militate against a finding that a class action here would be superior to individual actions.

The damage claim still being pressed under the Truth in Lending Act does not demand class treatment, due to the special provisions of that act providing for the award of attorney's fees to successful plaintiffs. [*Factor* (iv)]

Similarly, under the Interstate Land Sales Act, the typical claims of potential class members are in the range of several thousands of dollars, certainly enough to provide significant motivation for individual actions. [*Factor* (iv)]

The many potential issues of conflict between various class members, such as the conflicting remedies sought under the Interstate Land Sales Act, [*Factor* (v)] as noted in previous opinions in this action, further buttress the conclusion that a class certification would not further judicial economy or fair resolution of the disputes underlying this action.

It is not, then, surprising, that, faced with an extremely similar situation, the District Court of Georgia, in *Siebert v. Great Northern Development Company*, Civil Action No. 17349 (N.D. Georgia 1974), declined to certify a class action. [*Factor* (vi)]

For similar reasons, as well as those outlined above, the plaintiffs' application for certification as a class action must be denied.

IT IS SO ORDERED.

COURT OF APPEALS OPINION IN RELATED CASE

(Decided and Filed July 14, 1975)

No. 74-2002

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

DEBRA OTT, *Plaintiff-Appellant*, v. SPEEDWRITING PUBLISHING CO., INC. *et al.*, *Defendants-Appellees*

(Reproduced in Relevant Part)

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

LIVELY, Circuit Judge. The first question which must be decided in this case is whether the "death knell" doctrine as enunciated by the Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (1966) (*Eisen I*), *cert. denied*, 386 U.S. 1035 (1967), should be applied to permit the plaintiff Debra Ott to appeal from an order of the district court denying her request to prosecute this case as a class action under Rule 23, Fed. R. Civ. P.

* * * * *

The complaint alleged that the prerequisites to a class action set forth in Rule 23(a) have been met and certification of a class action was sought under 23(b)(1) or 23(b)(2), or in the alternative, under 23(b)(3).

* * * * *

ITTES made a motion to strike the class action allegations and filed affidavits in support thereof. The district court entered an order denying class action certification under Rule 23(c)(1) and filed a memorandum

setting forth its reasons. The plaintiff did not seek a ruling from the District Judge that his order involves a controlling question of law under 28 U.S.C. § 1292(b) or request that judgment be entered pursuant to Rule 54(b). Furthermore, although the district court order denied a preliminary injunction as well as class action certification, the plaintiff did not seek to appeal under 28 U.S.C. § 1292(a). The notice of appeal states that it is "from the order of the Court overruling the plaintiff's Motion to certify the present suit as a class action . . . ." Thus the plaintiff has proceeded under 28 U.S.C. § 1291 which provides that this court has jurisdiction of appeals from all "final decisions" of the district courts.

The defendant made a motion in this court to dismiss the appeal under Rule 8 of the Rules of the Sixth Circuit for lack of jurisdiction. This court ordered that the motion be passed for consideration by the panel to which the appeal was assigned. The parties have briefed and argued the questions raised by the motion to dismiss as well as the issue on appeal relating to the correctness of the action of the district court in denying class action certification.

Appealability

As Mr. Justice Powell wrote for the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (*Eisen IV*), "While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." (footnote omitted). In *Cobbledick v. United States*, 309 U.S. 323 (1940), the Supreme Court traced the history of the finality requirement as a condi-

tion of review in the federal system and stated that it "has been departed from only when observance of it would practically defeat the right to any review at all." *Id.* at 324-25 (footnote omitted). Exceptions to the finality requirement were spelled out more fully in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In discussing interlocutory appeals the Court stated:

> The effect of the statute is to disallow appeal for any decision which is tentative, informal or incomplete. Appeal gives the upper court a power to review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps toward final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> This decision appears to fall in that small class which finally determine claims of right separable

> from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569; *United States v. River Rouge Co.*, 269 U.S. 411, 414; *Cobbledick v. United States*, 309 U.S. 323, 328. 337 U.S. at 546

Noting that the order before it would not be appealable "if Congress has allowed appeals only from those final judgments which terminate an action," *id.* at 545, the Court permitted an appeal because the order constituted "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 546-57. The next year the Supreme Court held in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 514 (1950), that a party must appeal from an order disposing of all of the issues in the case in which it is directly involved where the decree is not "tentative, informal nor incomplete as to it . . .," or lose its right of appeal. Thus a party acts at its peril in assuming that every order preceding a "final judgment" is not appealable.

Since Rule 23 was amended in 1966 many courts have been faced with the necessity of determining the appealability of class action orders entered under Rule 23(c)(1). In *Eisen I, supra,* the court held that an order denying a plaintiff the right to prosecute his case as a class action was appealable because the amount involved was so small that the court could "safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." *Id.* at 120.

The court concluded that the case fell within that "small class" described in *Cohen v. Beneficial Industrial Loan Corp., supra,* and stated the requirement for appealability of this type order as follows:

> Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. 370 F.2d at 121.

The Second Circuit has further refined the death knell doctrine in subsequent cases in which the named plaintiff had a more substantial financial stake in the outcome than that of Mr. Eisen. *See e.g., Shayne v. Madison Square Garden Corp.,* 491 F.2d 397 (2d Cir. 1974); *Korn v. Franchard Corp.,* 443 F.2d 1301 (2d Cir. 1971); *Caceres v. International Air Transport Association,* 422 F.2d 141 (2d Cir. 1970); *City of New York v. International Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Green v. Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

The Supreme Court recognized the rationale of the death knell theory in *Eisen IV,* but did not specifically approve it. That case concerned appealability of an order relating to notice costs, and was decided on the basis of *Cohen v. Beneficial Industrial Loan Corp., supra.* While other courts of appeals have considered the death knell rule and some have applied it, only one, the Seventh, has rejected it outright. *See King v. Kansas City Southern Industries, Inc.,* 479 F.2d 1259 (7th Cir. 1973). The Court of Appeals for the Third Circuit noted the narrowness of the death knell rule and refused to apply it in *Hackett v. General Host Corp.,* 455 F.2d 618, *cert. denied,* 407 U.S. 925 (1972). In a carefully written dissent, Judge Rosenn expressed the view that the rule should be given a more liberal application and, specifically that the court

should have held the order denying class action certification in the *Hackett* case to be appealable. In *Weingartner v. Union Oil Co.,* 431 F.2d 26 (9th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971), the court held that an order denying class action certification was not appealable under Section 1291 because it did not fit the reasoning of the Supreme Court in the *Cohen* case. The court recognized the death knell doctrine, but held that this case more nearly resembled those decided by the Second Circuit after *Eisen I* where the plaintiffs had a sufficient financial stake to guarantee their individual continuation of an action. The court stated the rule to be that "an order dismissing a class action is appealable only when the dismissal for all practical purposes spells the end of the litigation." *Id.* at 29.

In *Williams v. Mumford,* ..... F.2d ....., No. 73-2120, D.C. Cir., Feb. 10, 1975), the court recognized the *Eisen I* death knell doctrine as an exception to the general rule that an order refusing to certify a class action is not a final decision under 28 U.S.C. § 1291, but found that both of the plaintiffs in that case had sufficient incentive to continue to press their claims apart from any right to proceed as a class action. The Court of Appeals for the Fifth Circuit has recognized death knell, but has held that when a plaintiff seeks to appeal an order denying class action certification he has the burden of developing facts before the trial court upon which findings of fact and conclusions of law may be rendered on the critical issue of whether such an order will actually extinguish the right to litigate. *Graci v. United States,* 472 F.2d 124 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973); *Gosa v. Securities Investment Co.,* 449 F.2d 1330 (5th Cir. 1971). While placing on the parties seeking to appeal the burden of developing a record, the court in *Graci, supra* at 126,

stated that "An individual claim may be so small but the unfeasibility of litigation by the individual plaintiff is clear without any further showing," citing *Eisen I.*

In *Walsh v. City of Detroit,* 412 F.2d 226 (6th Cir. 1969), we held that an order permitting a case to proceed as a class action is not a final order appealable under § 1291 since it can be reviewed along with the final judgment. This court also considered the appealability of orders dealing with collateral issues as defined in *Cohen v. Beneficial Industrial Loan Corp., supra,* and other Supreme Court cases in *Kowalski v. Holden,* 276 F.2d 359 (1960), and stated:

> It would appear from these cases that appeals on collateral issues will lie, when substantial rights would be lost, if the appeal were delayed until the main stream of the litigation is terminated. *Id.* at 360.

ITTES urges that even if this court should decide to follow the death knell doctrine, it should not be applied in an antitrust case such as the present one since the controlling statute provides that a person who establishes violation of the antitrust laws in a private action may recover "the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. It is contended that the main argument of *Eisen I,* that a competent attorney would not undertake costly and complex litigation with an extremely small amount involved, does not apply to those classes of cases where attorneys fees are allowed. Of course, antitrust actions are complex and ordinarily involve expenses beyond normal court costs and attorneys fees. It is settled that the words "cost of suit" in the statute quoted above do not mean "expenses of suit." *Straus v. Victor Talking Machine Co.,* 297 F. 791 (2d Cir. 1924); 6 J. Moore, Federal Practice ¶ 54.71 [3], at 1385 (2d ed. 1974). Further, the fees of expert witnesses are not included in the recoverable costs in an antitrust action. *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973). It has been held that "the only costs recoverable by a successful plaintiff in a private antitrust suit are those which are normally allowable under 28 U.S.C. § 1920 and Rule 54(d) . . . ." *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 224 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964). We do not believe that recovery of the costs allowable under 28 U.S.C. § 1920 and Rule 54(d) (*see* 6 J. Moore, *op. cit.,* ¶ 54.77) would be sufficient incentive for a plaintiff with a very small claim to pursue an antitrust action after denial of class action status.

We conclude that although the reference to death knell originated in *Eisen I,* it is but one concrete application of an exception to the rule of finality which has been recognized by the Supreme Court at least since its decision in *Cobbledick v. United States, supra.* In *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964), the Supreme Court approved the action of this court in deciding a case on appeal from an order striking portions of a complaint. It noted that previous departures from the requirement of finality had been approved in cases where a ruling was "fundamental to the further conduct of the case." *Id.* at 153. The Court referred to the necessity recognized in *Dickinson v. Petroleum Conversion Corp., supra,* to balance the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 338 U.S. at 511 (footnote omitted). We hold that the death knell doctrine is a legitimate expression of a well supported exception to the requirement of finality. Its application must depend, however, upon a balancing of the competing

considerations described by the Supreme Court. Such a balancing can only be based on the record before the appellate court. Thus, *we adopt the rule of the Fifth Circuit that no order denying class action certification may be appealed to this court unless the appealing party develops a factual record in the district court from which the District Judge may make findings on the issue of whether, for all practical purposes, the order from which the appeal is sought actually extinguishes the litigation. Gosa v. Securities Investment Co., supra.* The district court may dispense with this requirement in cases where it takes judicial notice that the amount involved is so small that it is obviously unfeasible for an individual plaintiff to continue the litigation without class action status. *Cf. Graci v. United States, supra.* In proper cases, a party seeking to appeal from a class action determination should seek a certification under 28 U.S.C. §1292(b) or entry of a partial judgment under Rule 54(b), Fed. R. Civ. P. In the interest of judicial economy, however, and noting that the plaintiff's total damages of $30 make this a case where further individual litigation may be presumed to be impracticable, we will proceed to decide the appeal which has been briefed and argued before us rather than remanding for findings by the district court. *Gillespie v. United States Steel Corp., supra.* The motion to dismiss this appeal for lack of jurisdiction is denied. [emphasis added]

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

RULE 23—CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decisions on the merits.

* * * * *

OHIO REVISED CODE

2505.02 (12223-2). *Final order.*

An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

* * * * *

Supreme Court, U. S.
FILED
OCT 15 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-460

LARRY E. COTTEN, *et al.*,
Petitioners,
vs.
TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

MARVIN A. SICHERMAN
DETTELBACH AND SICHERMAN
1300 Investment Plaza
Cleveland, Ohio 44114
Attorneys for Westinghouse Credit Corporation

THOMAS S. KILBANE
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Treasure Lake, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

October Term, 1975
No. 75-460

LARRY E. COTTON, ROBERT F. BOOTH, BARBARA D. BOOTH, RITA JOYCE SMREKAR, PAUL and MARJORIE LABIK, HERMAN and OPAL I. BAKER,
Petitioners,

vs.

TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Is the District Court's refusal to certify a class action an appealable order pursuant to either 28 U.S.C. Section 1291 or 28 U.S.C. Section 1292(a)(1).

STATUTES AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be held in the Supreme Court.

28 U.S.C. 1292(a) provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> • • • • •

Rule 23, Fed. R. Civ. P., provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

> class, and (4) the representative parties will fairly and adequately protect the interest of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> • • • • •
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; • • •
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be con-

ditional, and may be altered or amended before the decision on the merits.

* * * * *

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

The within action was commenced on February 9, 1973, by Larry E. Cotten, Robert F. Booth, and Barbara D. Booth (husband and wife) and Rita Joyce Smreker as Plaintiffs on their own behalf and allegedly on behalf of all others similarly situated against Treasure Lake, Inc. and Westinghouse Credit Corp. as Defendants. Subsequently, Paul and Marjorie Labik, and Herman and Opal I. Baker intervened as Plaintiffs. The claims asserted in the Amended Complaint seek damages and rescission under the Federal Consumer Credit Protection Act and the Interstate Land Sales Act from and against both Defendants. The claim of rescission under the Federal Consumer Credit Protection Act was dismissed by Court Order, from which no appeal was taken. (See letter of Mack Cook II to Hon. Frank J. Battisti, dated August 14, 1974, App. "A".)

The Petitioners sought class certification of this action under Rule 23(b)(3), Federal Rules of Civil Procedure. After receipt of briefs and oral argument on Petitioners' first Motion for Class Certification, and the filing of an Amended Complaint and briefs in response to Petitioners' Second Motion for Class Certification, the trial court, on November 14, 1974, entered an Order denying class status in the within cause. (See Pet. App., pp. 28-29.) In this order, the trial court concluded that common questions of law and fact do not predominate in this action, and that it could not be held that a class action would be superior

to other methods available for a fair and efficient adjudication of the controversy. Having reached this conclusion, the trial court made no findings relative to the other criteria to be considered in determining class certification, as such other findings are of no significance in this situation.

An appeal was taken from this Order to the United States Court of Appeals for the Sixth Circuit. Respondents filed a Motion to Dismiss the appeal on the grounds that the Order of the District Court denying certification as a class action was not a final decision or an appealable order under 28 U.S.C. §1291. The Motion to Dismiss was considered by the Court and was denied without prejudice to renewal when the appeal was to be heard on its merits. (See, Pet. App., p. 23.)

Subsequently, the Court of Appeals heard arguments on the merits of the case and also on the Motion to Dismiss, which motion had been renewed. The Court of Appeals granted the Motion to Dismiss the appeal on the ground that the decision of the District Court was not final and hence was not an appealable order. (See, Pet. App., pp. 23-26.) The Court of Appeals concurred with the District Court that the action failed to satisfy the requirement of predominate questions of law or fact required by Rule 23, Federal Rules of Civil Procedure, and that the amounts of the typical claims of potential class members were enough to provide significant motivation for individual actions. In addition, the Court of Appeals also found that because of the amount of the claim of each of the named Plaintiffs, this case did not require consideration of the "death knell" rule.

Subsequently, the Petitioners filed a Petition for Rehearing by the Court of Appeals, which Petition was denied. (See, Pet. App., p. 27.)

ARGUMENT

A. The Class Action Determination Is Not Appealable Under 28 U.S.C. §1291 as a Final Order.

The denial of class action status has generally been regarded as a nonappealable interlocutory order:

> When a district court denies class action status for a lawsuit without disposing of the claims of the individual plaintiff, this denial is not an appealable final order under 28 U.S.C. §1291. . . . *Graci v. United States*, 472 F.2d 124, 126 (5th Cir. 1973).[1]

The only generally recognized exception to the foregoing rule is that of "death knell". This exception, first enunciated in *Eisen v. Carlisle and Jacquelin*, 370 F.2d 119 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), has been applied only when

> the appellate court, considering the size of the individual plaintiff's claim, the extent of his financial resources, and the probable expense of his prosecuting a lawsuit to completion, determines the individual plaintiff cannot feasibly continue to litigate his claim alone. *Graci, supra*, at 126.

It can be seen that application of the "death knell" exception is a factual determination within the province of the district court. The district court in this case found that

1. It should be noted that a review of the case law dealing with this point reveals that no Circuit Court of Appeals has held contra: See *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (5th Cir. 1974); *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969); *King v. Kansas City Southern Industries*, 479 F.2d 1259 (7th Cir. 1973); *Hartman v. Scott*, 488 F.2d 1215 (8th Cir. 1973); and *Weingartner v. Union Oil Co. of California*, 431 F.2d 26 (9th Cir. 1970).

"the damage claim still being pressed under the Truth in Lending Act does not demand class treatment, due to the special provisions of that act providing for the award of attorney's fees to successful plaintiffs", and "under the Interstate Land Sales Act, the typical claims of potential class members are in the range of several thousand dollars, certainly enough to provide significant motivation for individual actions." (Pet. App., p. 29.) Likewise, the United States Court of Appeals for the Sixth Circuit found that "because of the amount of the claim of each of the named plaintiffs this case does not require consideration of the 'death knell' rule. . . ." (Pet. App., p. 25.)

The "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) was not applied by the Sixth Circuit for the simple reason that it is not applicable here. In *Cohen*, the collateral right which was too important to be denied review was the statutory right of a defendant to require a plaintiff to post security for its payment of all expenses of the defense if unsuccessful as a condition of prosecuting the action. In contrast, there is no vested or absolute right to be representative of a class. Rule 23(b), Federal Rules of Civil Procedure, states: "An action *may* be maintained as a class action. . . ." (emphasis added), and provides a framework for such maintenance subject to the satisfaction of its requirements. Once those requirements are met, a class may be certified, not before. In addition, under Rule 23(c)(1), Federal Rules of Civil Procedure, a class action determination may be conditional, and may be altered or amended at any time before a decision on the merits. Clearly, a class action determination is not encompassed in the "collateral order" doctrine.

> The effect of the statute (28 U.S.C. §1291) is to disallow appeal from any decision which is tentative,

> informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

The Sixth Circuit has clearly indicated that this matter remains open: "The order of the district court declining to certify the class may be fully reviewed in any appeal taken from a final judgment later entered in this case." (Pet. App., p. 26.)

Petitioners also contend that the District Court did not make the class determination as soon as practicable after commencement of the action as required by Rule 23 (c) (1), Federal Rules of Civil Procedure, pointing out that "the total of ninety-three (93) entries on the civil docket sheet of *Cotten* during this time period [February 9, 1973 to November 14, 1974] speaks for the lack of expeditious determination of the class aspect." It must be noted that "as soon as practicable" is a determination which, due to the individualness of each case filed in every court in this country, can be made only on a case by case basis. In the present case, Petitioners point out that this case began on February 9, 1973. (Pet., p. 19.) However, they fail to point out the fact that an Amended Complaint was filed on October 15, 1973; they fail to point out that in the interim they served defendants with two sets of interrogatories; they fail to point out that defendants filed a Motion to Dismiss for failure to state a claim on October 19, 1973; they fail to point out that on January 9, 1974, the District Court ordered the parties to submit full and comprehensive briefs on five issues relevant to a ruling on the Motion to Dismiss filed by the defendants; they fail to point out that a Second Application for Class Determination was filed on January 9, 1974; and they fail to point

out that the District Court's Memorandum Opinion and Order on the Motion to Dismiss was filed on August 8, 1974. In light of the foregoing, it is manifest that, considering the procedural complexity of this case, the District Court rendered its decision on class determination as expeditiously as possible.

B. The Class Action Determination Is Not Appealable Under 28 U.S.C. §1292(a)(1) as an Interlocutory Order Refusing Injunctive Relief.

Petitioners seek appealability under 28 U.S.C. §1292 (a) (1) contending that "[h]ad the class action been certified . . . an order commanding cancellation as to all affected lot purchasers could have been issued." (Pet., p. 11.) Although recognizing the factual difference, Petitioners cite *Brunson v. Board of Trustees of School District No. 1*, 311 F.2d 107, 108 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), *Yaffe v. Bowers*, 454 F.2d 1362 (1st Cir. 1972), and *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974) as being persuasive authority for their position. However, Petitioners have failed to recognize that the factual differences of these cases destroy their applicability to the case at bar. In *Brunson*, a class action was brought for injunctive relief against a school board which allegedly maintained a biracial school system; in *Yaffe*, a class action was brought against a city police chief for declaratory and injunctive relief; and in *Price*, a class action was brought for a violation of the Civil Rights Act of 1964, seeking injunctive relief. In each of these cases, certification of a class action was sought under Rule 23 (b) (2), Federal Rules of Civil Procedure, which provides for a class action seeking injunctive or declaratory relief with respect to the class as a whole. In addition, it should be noted that an appeal was heard in *Yaffe* primarily due to the fact that the district court's decision was clearly erroneous in light

of the fact that the criteria of Rule 23(b) were applied cumulatively rather than alternatively. See *Yaffe, supra,* at 1366. Conversely, on the facts of the present case, it is quite clear that there is no basis for §1292(a)(1) appealability. As was found by the District Court, certification for the class was sought pursuant to Rule 23(b)(3). (See Pet. App., p. 28.) In addition, in Petitioner's Second Application for Determination and Order That This Action is to be Maintained as a Class Action certification was sought pursuant to Rule 23(b)(3) only. (See Second Application, p. 13.) The Petitioners, in their Amended Complaint, have not sought injunctive relief. The prayer contained therein seeks

(a) damages and relief according to the provisions of the Consumer Credit Protection Act;

(b) damages and relief according to the provisions of the Interstate Land Sales Act;

(c) such other damages and equitable or other relief as this court shall find and deem just and equitable;

(d) reasonable attorney's fees, cost and expenses, and interest in awards.

(See Amended Complaint, p. 22.) Accordingly, the inapplicability of 28 U.S.C. §1292(a)(1) is clear.

Assuming, *arguendo,* that the petitioners' prayer for "such other damages and equitable or other relief" is to be construed as a prayer for injunctive relief, there are still no grounds laid for §1292(a)(1) appealability. The District Court did not state that the claim for equitable relief had no merit, nor that it lacked jurisdiction to grant an injunction, nor even did it express any opinion as to whether injunctive relief was warranted at any particular

point in the proceedings. The District Court simply denied certification of a class action under Rule 23, a quite distinguishable action. In short, the denial of class action treatment in this case constituted neither issuance nor denial of any injunctive or equitable relief. As a result, petitioners have failed to bring this case within the ambit of 28 U.S.C. §1292(a)(1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

MARVIN A. SICHERMAN
DETTELBACH AND SICHERMAN
1300 Investment Plaza
Cleveland, Ohio 44114
Attorneys for Westinghouse Credit Corporation

THOMAS S. KILBANE
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Treasure Lake, Inc.

APPENDIX A

MACK D. COOK, II
Attorney-at-Law
1600 First National Tower
Akron, Ohio 44308
(216) 376-1005

August 14, 1974

Honorable Frank J. Battisti
Chief Judge
United States District Court
Northern District of Ohio, E.D.
United States Court House
Cleveland, Ohio 44114

Re: Larry E. Cotten, et al
vs.
Treasure Lake, Inc., et al
Civil Action No. C73-144

Dear Judge Battisti:

The undersigned attorney and counsel for the Plaintiffs have read the MEMORANDUM OPINION AND ORDER of this Court filed and entered August 8, 1974.

This letter is addressed to that portion of the subject Order wherein this Court has ruled:

> "Plaintiffs failure to allege that a security interest was obtained in [Plaintiffs'] expected or present principal residences necessitates the dismissal without predjudice of [Plaintiffs'] equitable claims under the Truth in Lending Act." [p. 6]

After careful and full consideration of all aspects of the case; the claims, the defenses, the pendency of class

determination, the putative number of members in a Truth in Lending class [459] versus the number of members in an Interstate Land Sales class [459 plus 961 equal 1420], and perhaps most important of all, the evidence which would be presented at trial, we have concluded that we shall not now, on behalf of the Plaintiffs, submit a further amended complaint within the 15 days leave courteously granted by this Court.

This conclusion is also consistent with a statement made in the SECOND APPLICATION FOR DETERMINATION AND ORDER THAT THIS ACTION IS TO BE MAINTAINED AS A CLASS ACTION, filed January 9, 1974, to wit:

"As to Truth in Lending, each member of the class will have a claim as a matter of law against the Defendants, including damages under 15 USC §1640." [p. 5].

We shall now await the Defendants' response to Plaintiffs' class certification motion. Thereafter, it is our present intention to reply to the two issues set forth by the Court in the subject Order [p. 7].

Respectfully submitted,

/s/ Mack D. Cook, II
1600 First National Tower
Akron, Ohio 44308
(216) 376-1005

/s/ Ronald N. Towne
2210 First National Tower
Akron, Ohio 44308
(216) 535-2151

Carbon copies of this letter have been mailed to Marvin A. Sicherman and Thomas L. Kilbane, counsel for the Defendants.